

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

LOUIS MERRIWEATHER,	:	
	:	NO. 1:02-CV-00369
Petitioner,	:	
	:	
	:	<b>ORDER</b>
v.	:	
	:	
	:	
JAMES ERWIN	:	
	:	
Respondent.	:	

This matter is before the Court on the Magistrate Judge's Report and Recommendation (doc. 35) and the Petitioner's Response to that Report and Recommendation (doc. 36).

Petitioner brought a habeas corpus action pursuant to 28 U.S.C. § 2254 (doc. 35) and then Petitioner moved to voluntarily dismiss his petition (Id.). Petitioner's Motion to Voluntarily Dismiss His Habeas Corpus Petition (doc. 34), his Motion to "Advance the Cause," (doc. 32) and his Motion to Strike Previously Filed Motion for Newly Discovered Evidence (doc. 33) are the motions discussed and handled in the Magistrate Judge's Report and Recommendation (doc. 35).

Petitioner was convicted in 1997 upon his entry of a guilty plea before the Hamilton County, Ohio, Common Pleas Court to two counts of rape as defined in Ohio Rev. Code § 2907.02(A)(1)(b) (doc. 35). Four years later, Petitioner filed a

delayed appeal with the Ohio Court of Appeals (Id.). The Ohio Court of Appeals refused to allow Petitioner to make such an appeal (Id.). Subsequently, Petitioner initiated this action in April of 2002 (Id.). Petitioner's federal habeas corpus action and his amended petition (doc. 17) contain twelve grounds for relief (doc. 35).

Subsequent to the filing of his federal habeas corpus petition, Petitioner indicated to the Court that he was granted a delayed appeal on February 6, 2004 by the Ohio Court of Appeals, First Appellate District, and that this appeal was placed on the court's "accelerated calendar" (Id.). The final brief in this Ohio Court of Appeals action was due August 10, 2004 (Id.). The Court had not heard from Petitioner concerning this matter until he filed his Response to the Magistrate Judge's Report and Recommendation (doc. 36).

After filing his pending motion to "advance the cause" to resolve the instant petition at the "earliest date," Petitioner filed his motions to strike and to voluntarily dismiss without stating any reasons in support of these motions (Id.). The Magistrate Judge notes that pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, a court may dismiss an action "at the plaintiff's instance" upon "such terms and conditions as the court deems proper - said dismissal, unless specified in the order, is without prejudice (doc. 35 citing Fed. R. Civ. P. 41(a)(2)).

The Magistrate Judge could only speculate as to why Petitioner sought dismissal of his federal habeas corpus petition given that Petitioner had not informed the Court as to the status of his state appeal and because no reasons for requesting dismissal were specifically detailed in his dismissal motion (doc. 35).

The Magistrate Judge suggests several possible explanations (Id.). One, Petitioner intends to exhaust his pending state appeal first before seeking federal habeas relief (Id.). Two, that Petitioner has already obtained the relief he desires (Id.). Lastly, that Petitioner has concluded his request for relief is baseless (Id.). Regardless of being able to only speculate, the Magistrate Judge recommends that the Court grant Petitioner's Motion to Voluntarily Dismiss His Petition (doc. 34) and that his Amended Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (docs. 2 & 17) be dismissed without prejudice under the following terms and conditions but only to the extent (1) petitioner seeks a dismissal in order to exhaust his pending state remedies, and (2) the original petition is not found, as argued by respondent in the instant action to be time-barred under the one-year statute of limitations set forth in 28 U.S.C. § 2244(d) (doc. 35). However, the Magistrate Judge recommends that, if Petitioner seeks dismissal for reasons other than exhaustion grounds, the Court dismiss albeit with prejudice (Id.). As a

result of the Magistrate Judge's recommendation to grant Petitioner's Motion to Voluntarily Dismiss (doc. 34), the Magistrate Judge recommends the Court deny Petitioner's Motion to "Advance Cause" (doc. 32) and his Motion to Strike (doc. 33) as they would be rendered moot. In Petitioner's Response to the Magistrate Judge's Report and Recommendation (doc. 36), he indicates to the Court that he is seeking voluntary dismissal so as to exhaustively pursue his state appeal remedies (Id.).

Proper notice was provided to the Parties under Title 28 U.S.C. § 636(b)(1)(C), including the notice that they would waive further appeal if they failed to file an objection to the Magistrate Judge's Report and Recommendation in a timely manner. See United States v. Walters, 638 F.2d 947, 949-50 (6<sup>th</sup> Cir. 1981). It should be noted that the Respondent has not filed any Objections to the Magistrate Judge's Report and Recommendation.

The Court, therefore, having the benefit of Petitioner's Response indicating his reasons for seeking voluntary dismissal and having reviewed this matter de novo, pursuant to Title 28 U.S.C. § 636, finds the Magistrate Judge's Report and Recommendation to be correct (doc. 35). Accordingly, the Court hereby ADOPTS the Magistrate Judge's Report and AFFIRMS the Magistrate Judge's Recommended decision (Id.). In so doing, Petitioner's Motion to Voluntarily Dismiss His Writ of Habeas Corpus (doc. 34) is GRANTED without prejudice and Petitioner's Motion to "Advance Cause" (doc. 32) and Motion to Strike (doc. 33)

are DENIED since they are rendered MOOT by the granting of  
Petitioner's Motion to Voluntarily Dismiss without prejudice.

SO ORDERED.

Dated: February 14, 2005

/s/ S. Arthur Spiegel  
S. Arthur Spiegel  
United States Senior District Judge